

SERVICE DATE - LATE RELEASE SEPTEMBER 8, 2003

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34342

KANSAS CITY SOUTHERN
— CONTROL —
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY, AND
THE TEXAS MEXICAN RAILWAY COMPANY

Decision No. 7

Decided: September 8, 2003

Any party that would like to reply to the request of the Trustee of the Mexrail Voting Trust (in a letter dated September 5, 2003) for “authority, direction or guidance” should file its reply no later than 12:00 noon on Thursday, September 11, 2003.

BACKGROUND

KCS, KCSR, GWER, Mexrail, Tex Mex, TFM, Grupo TFM, TMM Multimodal, TMM Holdings, and Grupo TMM. Kansas City Southern (KCS, a noncarrier) controls The Kansas City Southern Railway Company (KCSR, a U.S. railroad and a wholly owned direct subsidiary of KCS) and Gateway Eastern Railway Company (GWER, a U.S. railroad and a wholly owned direct subsidiary of KCSR). Mexrail, Inc. (Mexrail, a noncarrier) controls The Texas Mexican Railway Company (Tex Mex or TM, a U.S. railroad and a wholly owned direct subsidiary of Mexrail). Prior to May 9, 2003, Mexrail was a wholly owned direct subsidiary of TFM, S.A. de C.V. (TFM).¹ TFM, a Mexican railroad, is owned by Grupo Transportación Ferroviaria Mexicana, S.A. de C.V. (Grupo TFM, which owns an 80% interest in TFM) and the Mexican Federal Government (which owns a 20% interest in TFM). Ownership of Grupo TFM is divided three ways: KCS owns, through two corporate chains, a 36.9% interest in Grupo TFM; TMM Multimodal, S.A. de C.V. (TMM Multimodal) owns a 38.5% interest in Grupo TFM; and TFM owns a 24.6% interest, with limited voting rights, in Grupo TFM (which, as has been noted, owns an 80% interest in TFM). TMM Multimodal is a 96.3%-owned direct subsidiary of TMM Holdings, S.A. de C.V. (TMM Holdings), which is itself a wholly owned direct subsidiary of Grupo TMM, S.A. (Grupo TMM).

¹ TFM, S.A. de C.V. (referred to as TFM), was formerly known as Transportación Ferroviaria Mexicana, S.A. de C.V. (also referred to as TFM).

Two Transactions: KCS/TM and KCS/TFM. On April 21, 2003, KCS and Grupo TMM announced a series of agreements that contemplate a KCS/TM transaction (the acquisition, by KCS, of control of Tex Mex) and a KCS/TFM transaction (the acquisition, by KCS, of control of TFM). The Board's approval of the KCS/TM transaction was sought by KCS by an application (referred to as the KCS/TM application) filed May 14, 2003, which the Board accepted for consideration in Decision No. 2 (served June 9, 2003, and published at 68 FR 35474 on June 13, 2003). The KCS/TFM transaction is not subject to the jurisdiction of the Board, see Decision No. 2, slip op. at 7 n.15, and, therefore, KCS has not sought the Board's approval of the KCS/TFM transaction.

The KCS/TM Transaction; Purchase Price; Voting Trust. One of the agreements (referred to as the Mexrail Stock Purchase Agreement) announced on April 21st contemplated the acquisition by KCS, from TFM, of 51% of TFM's 100% interest in Mexrail in exchange for \$32,680,000 in cash. The KCS/TM transaction contemplated by the Mexrail Stock Purchase Agreement (i.e., the acquisition, by KCS, of an indirect 51% interest in Tex Mex) is subject to the jurisdiction of the Board under 49 U.S.C. 11323(a)(5) ("Acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers."). On May 9th, KCS consummated the acquisition and acquired a direct 51% interest in Mexrail (and, therefore, an indirect 51% interest in Tex Mex). KCS has indicated, however, that, to avoid any violation of § 11323 et seq., it immediately placed the shares of Mexrail (i.e., KCS's 51% interest in Mexrail) into an independent irrevocable voting trust (the Mexrail Voting Trust) that was established pursuant to an agreement (the Mexrail Voting Trust Agreement) that KCS claims is consistent with 49 CFR part 1013.²

TFM's Right To Repurchase. The Mexrail Stock Purchase Agreement provides, in pertinent part, that "TFM shall retain the right to repurchase all of the Transferred Shares from KCS at any time [within two years of April 20, 2003] for an amount equal to the Purchase Price. Such right shall be unconditional and may be exercised in the sole discretion of TFM by written notice to KCS given by the Chairman of TFM and without any other corporate approvals of TFM or [Grupo TMM]." The Mexrail Stock Purchase Agreement further provides that, "[s]ubject to any STB approval requirements, the 'Repurchase Closing' shall take place on the fifth business day after receipt of such notice by KCS at such time and place as agreed to in writing by KCS and TFM." KCS-3 at 177.

² Although, as noted in Decision No. 2, slip op. at 6-7, KCS initially indicated that it had placed the shares of Mexrail *and* Tex Mex into the voting trust, see KCS-3 at 19 n.12 ("[I]n an abundance of caution, KCS has placed both the shares of Mexrail and Tex Mex into the voting trust."), KCS later clarified that only the shares of Mexrail had been placed into the voting trust, see KCS-8 at 2.

TFM's Exercise Of Repurchase Right; KCS's Response. On August 27, 2003, the Chairman of TFM gave written notice to KCS that TFM was exercising its right to repurchase the 51% interest in Mexrail that KCS acquired on May 9th. On September 3, 2003, KCS gave the Trustee of the Mexrail Voting Trust an "irrevocable" direction, "following receipt of an appropriate STB order (if required) and receipt of funds called for under the Mexrail Stock Purchase Agreement (the repurchase price shall be for the sum of US\$32,680,000.00) to deliver to TFM at the Repurchase Closing stock certificates representing the Transferred Shares endorsed in blank or accompanied by duly executed assignment documents."

Trustee's Request For Authority, Direction, Or Guidance. By letter dated September 5, 2003, the Trustee of the Mexrail Voting Trust (Thomas F. Power, Jr.) has asked "that the Board provide such authority, direction or guidance as the Board deems appropriate" with respect to the proposed repurchase of the 51% interest in Mexrail that KCS acquired, and placed in the Mexrail Voting Trust, on May 9th.

DISCUSSION AND CONCLUSIONS

The acquisition by TFM of the 51% interest in Mexrail now held in the Mexrail Voting Trust will undoubtedly give TFM "control" of a U.S. railroad (Tex Mex), but such an acquisition would not ordinarily be subject to the Board's 49 U.S.C. 11323 "control" jurisdiction. That jurisdiction, by its terms, applies only to control transactions that bring *two or more* U.S. railroads under common control. All indications are that, once the acquisition has taken place, Tex Mex will be the only U.S. railroad in which TFM will have a controlling interest.

When (as here) a controlling interest in a U.S. railroad has been placed in a voting trust pending action by the Board on a § 11323 control application, however, the Board has the authority to approve both a plan of divestiture and the sale (or other disposition) of the controlling interest held in the voting trust, even when the person acquiring the controlling interest would not otherwise require authority under § 11323 to consummate such acquisition. See Santa Fe Southern Pacific Corp. — Control — SPT Co., 2 I.C.C.2d 709, 834 (1986) (the jurisdiction of the Interstate Commerce Commission "to oversee the orderly divestiture" of stock held in a voting trust is "inherently within [the ICC's] authority to approve consolidations and acquisitions of control."). See also Union Pacific Corporation, et al. — Request For Informal Opinion — Voting Trust Agreement, Finance Docket No. 32619 (ICC served Dec. 20, 1994), slip op. at 6 (the party setting up the voting trust was required "to specify in the voting trust agreement that the Commission will have authority to approve both a plan of divestiture and the sale (or other disposition) of the trust stock, whether or not the purchaser requires section 11343 authority from us to acquire that stock and whenever such divestiture and sale take place.").

The "plan of divestiture" with respect to which the Trustee now seeks authority, direction or guidance would appear to restore the status quo ante that existed prior to May 9th, and would

seem to leave KCS, TFM, and Tex Mex (and all other persons) in exactly the same positions they were in prior to KCS's acquisition of a 51% interest in Mexrail. And all indications are that nothing that has happened in the past four months has made restoration of the status quo ante a physical impossibility. Nor does the record indicate any events in the past four months that would alter the relative economic positions of KCS, TFM, and Tex Mex. See SF/SP, 2 I.C.C.2d at 834-35 (the divestiture of stock held in a voting trust "should be accomplished with the least possible disruption of the market and in a manner wholly consistent with the public interest," and the "financial condition at the time of divestiture [of the railroad whose stock has been held in the voting trust should] be at least as sound as it was prior to its being placed in trust").

Before the Board issues a decision approving the transfer, interested parties will be invited to submit comments on this matter. Interested parties may submit comments no later than 12:00 noon on Thursday, September 11, 2003.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Any party may reply, no later than 12:00 noon on Thursday, September 11, 2003, to the Trustee's request for authority, direction, or guidance respecting the proposed transfer back to TFM of the 51% interest in Mexrail that KCS acquired on May 9th.
2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary